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No. 04-905

In the Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,

Petitioner,

v.

REEDER-SIMCO GMC, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONER VOLVO TRUCKS NORTH AMERICA, INC.

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QUESTIONS PRESENTED

The Robinson-Patman Act prohibits specified forms of price discrimination "between different purchasers" where the effect of "such discrimination" may be harm to competition "with any person who * * * knowingly receives the benefit of such discrimination." The questions presented are:

1. Whether there is a violation of the Act – permitting recovery of damages – when a disfavored purchaser does lose sales or profits to a competitor that does *not* purchase from the defendant, but does not lose sales or profits to any purchaser that "knowingly receives the benefit of" the defendant's price discrimination.

2. Whether an unaccepted offer that does not lead to a purchase – so that there is not "discriminat[ion] * * * between different purchasers" as the statutory language contemplates – may be the basis for liability under the Act.

PARTIES TO THE PROCEEDING

The petitioner is Volvo Trucks North America, Inc., defendant-appellant in the courts below. The respondent, plaintiff-appellee in the courts below, is Reeder-Simco GMC, Inc.

RULE 29.6 STATEMENT

Volvo Trucks North America, Inc., is a wholly owned subsidiary of VNA Holdings, Inc., which is a wholly owned subsidiary of AB Volvo, a publicly traded corporation.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The majority and dissenting opinions of the Eighth Circuit (Pet. App. 1a-32a) are reported at 374 F.3d 701. The district court's judgment (Pet. App. 33a-34a), memorandum opinion (JA 486-496) and order denying judgment as a matter of law (Pet. App. 35a) are unreported. The district court's order on the jury verdict (Pet. App. 36a-39a) and order granting summary judgment in part (Pet. App. 40a-42a) also are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2004. The order of the court of appeals denying rehearing (Pet. App. 43a-44a) was entered on October 6, 2004. The petition for a writ of certiorari was timely filed on January 4, 2005, and granted on March 7, 2005. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), makes it unlawful

> to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

STATEMENT

The plaintiff in this case, respondent Reeder-Simco GMC, Inc. (Reeder), did not identify a single instance of "discriminat[ion] in price between different purchasers" that injured "competition" with any person that "receive[d] the benefit of

such discrimination." That fact, alone, requires judgment for the defendant-petitioner, Volvo Trucks North America, Inc. (Volvo). The language of the Robinson-Patman Act is unclear about some things, but not about this: A plaintiff must show all the elements of liability – the defendant *sold* (not merely that it offered to sell) a product at two different prices, and that "such discrimination" impaired *competition* with *a favored purchaser* who "receive[d] the benefit of" the discrimination.

A. Volvo's Product Distribution Practices

Volvo manufactures a broad line of heavy trucks, in competition with other manufacturers such as Freightliner, International, Peterbilt, and Kenworth. Heavy trucks are used for hauling freight, for transporting chemicals or petroleum, for mixing and delivering concrete, for construction projects, and for many other purposes. To accommodate these many different uses, Volvo's trucks are built to order to meet an individual customer's needs. Customers can choose among several different base models of trucks, each of which can be built with the specific kind of engine, transmission, brakes, axles, suspension, and other components that will best suit the customer's requirements.

Volvo distributes its trucks throughout the United States through a network of independent dealers, who sell to retail customers. These retail customers typically solicit competitive bids from several dealers representing different manufacturers, and then purchase from the dealer offering the most attractive bid. Most trucks are built to order after the retail customer has contracted to buy from a dealer. Pet. App. 2a. It would be prohibitively expensive for a dealer to maintain an inventory of trucks sufficient to meet the widely diverse needs of its potential retail customers. Therefore, during the competitive bidding process Volvo *offers* to sell trucks to its dealers that will meet the retail customer's specifications, and its dealers offer to sell those trucks to the retail customer. A dealer *purchases* the trucks from Volvo only if the retail customer accepts the dealer's bid.

No evidence was presented in this case of a sale by Volvo to a dealer whose bid to a customer had *not* already been accepted.

Volvo offers a base wholesale price to its dealers that is 80% of its published retail price. Pet. App. 2a. During the competitive bidding process, however, dealers often seek an additional discount, or "concession," from the base wholesale price. Such discounts permit the dealer, if it independently decides to do so, to submit a lower bid to the potential retail customer. *Ibid.* Volvo's district sales managers are authorized but not required to offer such discounts up to amounts specified in a matrix that Volvo does not disclose to its dealers or to the public. JA 325, 335-339. Higher-level personnel from Volvo's headquarters are authorized but not required to offer even larger discounts. See JA 345.

Volvo decides on a case-by-case basis whether to offer a discount and how large such a discount will be, after considering the circumstances of a specific bidding situation. JA 348-349. For example, Volvo may offer a larger discount if its assembly plant is operating well below capacity or if industry-wide demand for trucks is declining. JA 331-332, 334. It may offer a larger discount for a retail customer that has historically purchased a different brand of truck, and may offer an even greater discount if that customer is expected to purchase a large number of trucks in the future. JA 333-334. Because of these and other factors that vary over time and from one retail customer to another, Volvo frequently offers a different discount – and hence a different price – to a dealer in connection with a bid to one retail customer than it offers to that dealer (or to another dealer) in connection with a bid to a different retail customer. JA 342-344. Other truck manufacturers use similar pricing practices. JA 334, 337; see also *Metro Ford Truck Sales, Inc.* v. *Ford Motor Co.*, 145 F.3d 320 (5th Cir. 1998) (describing similar pricing practices by Ford), cert. denied, 525 U.S. 1068 (1999).

When two or more Volvo dealers are competing to sell to the same retail customer, Volvo offers the same discount to each. JA 347, 352, 354. Although Volvo's dealer contracts do not prohibit its dealers form selling outside their designated geographic territories, head-to-head competition between Volvo dealers for the same customer is the exception rather than the rule. JA 347-348. Most retail customers solicit a bid from only one Volvo dealer.

B. Reeder's Robinson-Patman Act Claims

Reeder is a truck dealer located in Fort Smith, Arkansas. Pet. App. 2a. In 1995, Reeder entered into a five-year franchise agreement with Volvo, with provisions for automatic one-year extensions if Reeder met certain sales objectives that were to be unilaterally determined by Volvo. Pet. App. 2a. Volvo placed Reeder on "probationary" status when it failed to meet those objectives in 1995 and 1996. JA 26-27, 56-57; see JA 377, 445-446. After Reeder failed to meet the objectives in 1997 and 1998, Volvo notified Reeder that, if it did not meet the 1999 objectives, its franchise would be terminated effective March 31, 2000. Reeder C.A. Br. 4-5; see also JA 377. In February 2000, Reeder sued Volvo, alleging among other things that Volvo had violated the Robinson-Patman Act.[1] Pet. App. 3a.

At trial, Reeder offered anecdotal comparisons of the discounts Volvo offered to Reeder and the discounts Volvo offered to other dealers in selected transactions. Reeder's evidence consisted of three different kinds of comparisons.

[1] Reeder also alleged a violation of the Arkansas Franchise Practices Act, ARK. CODE ANN. §§ 4-72-201 to 4-72-209. Pet. App. 2a. The district court entered a judgment in favor of Reeder on this claim that was affirmed by the court of appeals. Volvo does not challenge that judgment here.

1. The "Sales-To-Sales" Comparisons

The first kind of evidence involved comparisons between the discounts at which Volvo sold to Reeder, in connection with Reeder's sales to four specific retail customers, and the discounts at which Volvo sold to other Volvo dealers, in connection with completely separate transactions involving different retail customers. Pet. App. 4a-6a. For example, Volvo granted a 19% discount to Reeder in connection with Reeder's successful bid in February 1997 to sell two trucks to the city of Fort Smith, Arkansas. Reeder compared that discount to a 21% discount that Volvo granted three months earlier to a Volvo dealer in Kansas City, in connection with its successful bid to sell two trucks to Rapidways, a retail customer located in Kansas City. Pet. App. 5a. Reeder contended that the differing discounts constituted discrimination in price for commodities of like grade and quality, even though the trucks sold to Reeder in the Fort Smith transaction had different engines, transmissions, front and rear axles, and suspensions than the trucks that were sold in the Rapidways transaction, and even though the two transactions were separated by three months. C.A. App. 1582.

Reeder did not contend that any of its sales in these "sales-to-sales" comparisons were unprofitable. Rather, Reeder contended that it would have earned even greater profits on those sales if Volvo had given Reeder the same discount that another Volvo dealer was given in the other transaction. Pet. App. 4a-6a; see also C.A. App. 149-157.

Reeder did not compete against another Volvo dealer for *any* of the retail sales that were examined in the sales-to-sales comparisons. In other words, there was no evidence that Reeder's profits on these sales were constrained because Reeder was bidding against another Volvo dealer that received a greater discount. Reeder faced inter-brand competition from non-Volvo dealers, but there was no intra-brand competition at all in these transactions.

2. The "Offers-To-Sales" Comparisons

Reeder also produced anecdotal evidence showing the discounts that Volvo *offered* to Reeder in connection with twelve of its unsuccessful bids for retail sales, and compared those discounts to the discounts at which Volvo *sold* trucks to other Volvo dealers in connection with their successful bids to different retail customers. Pet. App. 6a. For example, Volvo offered a 23.8% discount to Reeder in connection with Reeder's bid to sell trucks to Beach Trucking. Reeder's bid was unsuccessful, however, so it did not purchase the trucks from Volvo at that price. The 23.8% discount offered to Reeder was compared to a 26.1% discount at which Volvo sold trucks to another dealer in connection its successful bid to a different retail customer. *Ibid.*

Reeder contended that these unsuccessful sales efforts could have succeeded if Volvo had granted a larger discount to Reeder. But there was no evidence that Reeder lost any of these potential sales to another Volvo dealer who had received a larger discount. In all of the offers-to-sales comparisons, as in all of the sales-to-sales comparisons, Reeder was competing only against non-Volvo dealers. Pet. App. 6a.

Moreover, none of the offers-to-sales or sales-to-sales comparisons highlighted by the court of appeals involved Volvo dealers in close geographic proximity to Reeder. Reeder's designated area of responsibility covered 10 counties in western Arkansas and 2 counties in eastern Oklahoma. Reeder's manager, Bill Heck, testified that more than 75% of the trucks Reeder sold from 1995 to 2000 were sold to customers with a presence in this geographic area. C.A. App. 1410.

3. The "Head-To-Head" Comparisons

In the five years in which Reeder claimed discrimination, Reeder submitted bids to sell 5000 trucks (JA 77-79), but Reeder's principal witness testified that it competed against another Volvo dealer only two or three times during that period.

JA 304-305. Reeder produced specific evidence of only two instances of alleged discrimination in which Reeder and another Volvo dealer were involved in such "head-to-head" competition for the same potential sale. Pet. App. 12a. In neither case did Reeder purchase from Volvo.

In one of the head-to-head comparisons, Reeder competed with Southwest Missouri Truck Center to sell twelve trucks to Hiland Dairy. In January 1999 Southwest requested and was offered a 7.5% discount; Reeder subsequently requested a 12% discount but was offered only the 7.5% that Volvo had previously offered to Southwest. Pet. App. 4a. Hiland did not make its purchasing decision until August 1999, however, and in the intervening period Volvo increased its base wholesale price. Hiland decided to purchase from Southwest but demanded the price that had been quoted in January. In response, to compensate for the intervening increase in its base price, Volvo agreed to increase its discount to Southwest to 8.5%. JA 352-353; see also Pet. App. 4a; JA 475-479. Reeder made no effort to show that this level of discount would have been unavailable to it in August 1999, had it still been in negotiations with Hiland Dairy.

In the only other head-to-head comparison Reeder identified – a bid to sell five trucks to Tommy Davidson (Pet. App. 12a) – Volvo offered an 18.9% discount to Reeder and to the other Volvo dealer, but Reeder complained that it was offered the 18.9% discount too late, and lost credibility with the customer as a result. JA 192-194. Tommy Davidson chose not to purchase from either Reeder or the other Volvo dealer, but instead bought Freightliner trucks. JA 194.

In the two head-to-head comparisons, as in all of the offers-to-sales comparisons, Reeder never purchased trucks from Volvo, because Reeder's bids to sell to the retail customer were rejected. And in the Tommy Davidson transaction, as in all of the offers-to-sales transactions, the retail customers who

rejected Reeder's bids chose to purchase from non-Volvo dealers, not from another Volvo dealer.

Reeder also produced evidence that Volvo adopted a business strategy, the "Volvo Vision," that included plans to reduce the number of Volvo dealers and to increase the average size of the regions that its dealers served. Reeder contended that Volvo limited the discounts it offered to Reeder in order to eliminate Reeder as a dealer. Pet. App. 3a.

To prove damages, Reeder relied principally on testimony by its co-owner concerning lost profits and the decline in the company's value over the five-year period of its claim, and on a comparison between its actual sales and the sales objectives that had been established by Volvo for that period. See Pet. App. 20a-22a. Neither measure of damages distinguished between sales and profits lost in competition with other Volvo dealers, and sales and profits lost in competition with non-Volvo dealers. Nor did either one of the damages calculations purport to include harm that was the result of injury to competition, rather than harm in the sense that Reeder did not make as much money as it otherwise would have.

The jury returned a verdict for Reeder on its RPA claim. It found that Reeder suffered actual damages of $1,358,000 because of price discrimination in violation of the RPA, and those damages were automatically trebled to $4,074,000. Pet. App. 33a, 38a. (In the only sale that Reeder lost to another Volvo dealer, the sale to Hiland Dairy, Reeder had contended that it lost $30,000 in gross profits. Pet. App. 4a.) Volvo moved for judgment as a matter of law, which the district court denied. *Id.* at 35a.

C. The Court of Appeals' Decision

A divided panel of the Eighth Circuit affirmed the judgment for Reeder. The majority opinion described the evidence of the offers-to-sales, sales-to-sales, and head-to-head comparisons, as well as the evidence of Volvo's strategy to reduce the number

of dealers through which it would sell its trucks, then turned to the requisite elements of secondary-line RPA violations.[2]

The majority indicated that "as a threshold matter Reeder had to show it was a 'purchaser' within the meaning of the RPA." Pet. App. 8a. The majority also recognized that Reeder was required to show that it competed with favored Volvo dealers, but it did not describe this as a requirement of competition for the same customers. Instead, the majority indicated that "'the favored and disfavored purchasers [must] compete[] at the same functional level, i.e., all wholesalers or all retailers, and within the same geographic market.'" Pet. App. 11a (quoting *Best Brands Beverage, Inc.* v. *Falstaff Brewing Corp.*, 842 F.2d 578, 585 (2d Cir. 1987)). The majority indicated that the RPA required proof of competitive injury, which it described by quoting in part the language of the statute: "The RPA prohibits price discrimination 'where the effect of such discrimination may be substantially to lessen competition * * * or to injure, destroy, or prevent competition.'" Pet. App. 14a (quoting 15 U.S.C. § 13(a)). The majority's quotation omitted the key phrase that follows the quoted language: "with any person who either grants or knowingly receives the benefit of such discrimination." 15 U.S.C. § 13(a).

When it analyzed these essential elements of an RPA claim, however, the majority addressed each in isolation from the others, cobbling together an RPA violation by aggregating elements of wholly distinct transactions. It concluded that Reeder was a "purchaser" because, in the four sales-to-sales compari-

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[2] RPA cases are often described in terms of the relationship between the seller and the party who claims competitive injury. "Primary-line" injury refers to injury to a discriminating seller's competitor; "secondary-line" injury refers to injury to a discriminating seller's customer; and "third-line" injury refers to injury to a customer of the customer of the discriminating seller. 3 EARL W. KINTNER & JOSEPH P. BAUER, FEDERAL ANTITRUST LAW §§ 20.9-20.12 (1983); 14 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2300 (1999).

sons, it actually purchased trucks from Volvo. Pet. App. 10a. In those comparisons, though, there was no competition between Reeder and another Volvo dealer. When the majority considered whether Reeder was in actual competition with favored purchasers, it relied on the two head-to-head comparisons (*id.* at 11a-12a), but in those comparisons it was clear that there was no "purchase" by Reeder. The majority also stated that Reeder competed against favored Volvo dealers on the basis of evidence that Reeder and other dealers competed (or could compete) in the same geographic area (*ibid.*), even though there was no evidence (other than the two head-to-head comparisons that failed to result in Reeder purchases) that Reeder and the other dealers competed for the same customers.

The majority held that the evidence was sufficient to show competitive injury, which it described as "lost profits and sales to Reeder and other dealers, and that favored competitors received substantial price reductions over a substantial period of time." Pet. App. 15a. In support of that holding, however, the majority pointed to profits that Reeder lost in the sales-to-sales transactions in which Reeder competed only against non-Volvo dealers. *Id.* at 16a. The majority also relied on the evidence of Volvo's plans to reduce the number of dealers, stating that "the jury properly could infer [that] Volvo's intent to reduce the number of its dealers manifested itself in the discriminatory concession practices." *Ibid.* The majority thought that "the elimination of some dealers like Reeder" was "precisely the type of injury the antitrust laws were meant to prevent." *Id.* at 19a.

Judge Hansen dissented, describing the majority's opinion as an "attempt to fit a square peg into a round hole." Pet. App. 27a. He observed that the market for heavy truck sales

> will never produce the kind of competition the RPA was designed to protect because it will never result in the type of two-purchase transaction that itself creates a market for the goods that are sold. Indeed, where, at the time of the end purchase, only one possible seller and one possible buyer exist, competition is totally absent. It is the nature of competitive bidding, not price discrimination, that makes it so.

Id. at 27a-28a. Judge Hansen noted that "'purchaser status' is inextricably intertwined with the existence of actual competition and the potential threat thereto." *Id.* at 28a. In the heavy truck market, "although Reeder and other 'favored' dealers may have competed generally with each other in the larger market for obtaining bids, there is evidence of only two occasions where Reeder competed with a 'favored' Volvo dealer for an actual sale." *Id.* at 29a. The sales-to-sales comparisons were irrelevant "because there was no actual competition between the two dealers at the time of the sales to the separate and different end users." *Ibid.*

Judge Hansen also noted that RPA liability properly can be imposed "only where the factors necessary to state an RPA claim all are present in the same relevant transaction. To the extent that the court looks for the existence of one factor in one transaction and the existence of another factor in a second transaction, I conclude that the proof * * * is too tenuous." Pet. App. 30a. The absence of any evidence that sales or profits were diverted from Reeder to favored dealers was also a critical deficiency in Judge Hansen's view. "Although Volvo's conduct may have injured Reeder's ability to compete with non-Volvo dealers, Reeder must look outside the RPA for any relief for this claimed injury. Contrary to the court's assertion, such an injury is not the type of injury to competition that the RPA was intended to prevent." *Id.* at 29a-30a.

Volvo's petition for rehearing *en banc* was denied. Judges Gruender and Hansen dissented. Pet. App. 43a-44a.

SUMMARY OF ARGUMENT

The RPA is not violated unless the plaintiff shows a diminution in its ability to compete with a person who "receive[d]

the benefit of [price] discrimination." The statute requires a showing of harm to *intra*-, not inter-brand competition. In all of the sales-to-sales and offers-to-sales comparisons, the "favored" Volvo dealer was competing with someone else, not Reeder, to make its sale, and Reeder was competing with the seller of some other brand, not a Volvo dealer, to make its sale.

The one sale Reeder lost to another Volvo dealer, the Hiland Dairy transaction, cannot support a judgment against Volvo because Reeder did not purchase trucks from Volvo in that transaction and because the RPA prohibits only discrimination "between different purchasers." In addition to being plain from the statutory language, the two-purchase requirement has been a recognized bright-line rule in RPA cases and treatises since at least 1939. Any other rule would – as the facts of the Hiland Dairy transaction indicate – lead to meaningless gestures that are of no benefit to anyone and may well harm consumers.

Reeder has never cited any authority that contradicts the principles discussed above. Its strategy, so far, has been to play a game of three-card monte. To show that it was a purchaser, it points to transactions in which it did not compete against another Volvo dealer. To show that it competed against other Volvo dealers, it points to transactions in which it did not purchase from Volvo. To show that there was discrimination, it points to transactions in which it did not compete against other Volvo dealers and transactions in which it did not purchase from Volvo. Treble-damage liability under the RPA requires more than this sleight-of-hand. Reeder must show that illegal price discrimination by Volvo *caused* Reeder antitrust injury, and its mix-and-match approach cannot possibly show causation.

Those issues aside, the Court should take this occasion to recognize that the RPA, by its language, protects *competition*, not competitors. Neither statutory language nor legislative history justifies the decisions of lower courts that have insisted that the RPA be interpreted – in disharmony with other antitrust statutes – to protect competitors even when (as in this case)

there is demonstrably no harm to consumers or the competitive process. This Court in *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993), took the occasion to correct lower courts' overreading of the decision in *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967), to suggest in primary-line cases that competitors and not competition should be protected. In this case take the Court should similarly take occasion to correct lower courts' overreading of *dicta* in *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 49 & n.18 (1948), to protect competitors and not competition in secondary-line cases. The Court can, however, easily reverse the judgment below – even if it assumes, *arguendo*, that the RPA protects competitors and not just competition in secondary-line cases – by simple adherence to the other statutory language discussed above.

ARGUMENT

"[S]ales of like goods in interstate commerce violate" Section 2(a) "if three conditions are met: (1) the seller discriminates in price between *purchasers*, (2) the effect of such discrimination may be to injure competition *between the victim and beneficiaries of the discrimination* or their customers, and (3) the discrimination is not cost based." *Texaco Inc.* v. *Hasbrouck*, 496 U.S. 543, 577 (1990) (Scalia, J., concurring in the judgment) (emphasis added). Reeder failed to produce evidence of *any* sale that met those criteria. The sales-to-sales comparisons failed to satisfy condition number two because, in those transactions, there was no competition between Reeder and the beneficiaries of the alleged discrimination. The head-to-head comparisons failed to satisfy condition number one because, in those transactions, there was no discrimination between "purchasers." The offers-to-sales comparisons failed to satisfy *both* conditions one and two. Those transactions did not involve discrimination between two purchasers *or* competition between Reeder and a beneficiary of the alleged discrimination.

Reeder's claim fails for an additional reason. The RPA requires proof of injury to "competition." Injury to an individual

competitor, in circumstances that preclude any injury to competition, cannot satisfy that statutory requirement. The Court can reverse the judgment below on the basis of other aspects of the plain statutory language even if it assumes, *arguendo*, that injury to an individual competitor such as Reeder suffices. Nevertheless, this case gives the Court a valuable and rare opportunity to clarify that "competition" in the RPA does not have a different meaning from the use of that term in antitrust law generally, and to make more concrete its admonition in *Brooke Group, Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993), that "Congress did not intend to outlaw price differences" – such as those at issue in this case – "that result from or further the forces of competition."

I. The RPA Does Not Protect Competition Between Disfavored Purchasers And Those Who Do Not Purchase The Defendant's Product And Therefore Do Not "Receive The Benefit Of" The Discrimination

The RPA "as a practical matter could not, and does not, ban all price differences." *Brooke Group*, 509 U.S. at 220. Price "discrimination" has been construed very broadly to mean simply a difference in price. *Texaco Inc.* v. *Hasbrouck*, 496 U.S. at 558; *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960). But the extraordinary breadth of that definition is tempered by the statute's requirement that plaintiffs, to show that price discrimination is illegal, must prove that the price difference had a proscribed effect on competition.

Price discrimination is illegal only if "the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U.S.C. § 13(a). In a case such as this one, alleging secondary-line price discrimination, the plaintiff must show at a minimum that the discrimination impaired its ability to compete with a favored purchaser,

i.e., a person who "receive[d] the benefit of such discrimination."[3] In this case, Reeder must show that discrimination affected its ability to engage in intra-brand competition against other Volvo dealers who received a more favorable price. If discrimination affected Reeder only in its inter-brand competition against non-Volvo dealers, it does not fall within the prohibition of Section 2(a).[4]

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[3] In the alternative, a plaintiff may prove that the effect of the discrimination "may be substantially to lessen competition or tend to create a monopoly in any line of commerce." This alternative standard is more demanding of plaintiffs because it requires proof not only that competition with favored purchasers has been impaired, but that competition in the market generally may be harmed. See *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 49 (1948) (discussing the distinction between the two kinds of competitive injury). When construing the less-demanding requirement of injury to competition with favored purchasers, courts of appeals have differed over whether harm to an individual competitor, rather than harm to "competition," constitutes a cognizable injury. We address that issue in Section IV of this brief. Sections I-III of this brief demonstrate that the judgment for Reeder should be reversed even if the RPA protects against mere injury to a competitor, because other statutory requirements for liability are not present.

[4] The terms "intra-brand competition" and "inter-brand competition" are sometimes used for convenience in this brief. Those terms accurately describe the relevant RPA distinction (the plaintiff's competition against others who buy the defendant's products, on the one hand, versus the plaintiff's competition against those who do not buy the defendant's products) in this and in most RPA cases. However, there are some cases in which the intra-brand/inter-brand distinction does not coincide with the relevant RPA distinction. First, because the RPA applies to the sales of unbranded as well as branded products, it does not require proof of "intra-*brand*" competition in cases involving unbranded products. Second, the RPA can apply to price differences between two brands sold by a single seller, if the brands are of like grade and quality, so inter-brand competition may be implicated by the RPA when two brands are sold by a single seller. *Texaco Inc.* v. *Hasbrouck*, 496 U.S. at 556 n.14 (citing *FTC* v. *Borden Co.*, 383 U.S. 637, 645-646 (1966)). Neither of those situations is present here.

As Professor Hovenkamp explains:

> The theory of secondary-line Robinson-Patman injury is that the unlawful price discrimination injures the disfavored purchaser[] in its ability to compete with the favored purchaser. * * * [T]he mere payment of a higher price than someone else pays for something is insufficient to support the injury requirement. The disfavored purchaser must be injured in its ability to compete with the favored purchaser. For example, suppose that General Motors sells automobiles to a small dealer in Decatur, Michigan, at a higher price than it does to a large dealer in Atlanta, Georgia. But the two dealers each operate in their own geographic areas and never compete for sales to the same customers. We can certainly say that the Decatur dealer has suffered an injury in the sense that it would be better off if it could purchase cars more cheaply, paying the same price that the Atlanta dealer pays. But this is not the injury that the Robinson-Patman Act contemplates. The injury is not merely in the higher purchase price that would injure any purchaser of an input, but in the loss of ability to compete effectively with the favored purchaser. A plethora of decisions have asserted this basic proposition.

14 HOVENKAMP, *supra*, ¶¶ 2333a-2333b, at 88-89.

1. This Court has consistently and repeatedly described the requisite competitive injury in terms of the diversion of sales or profits from disfavored purchasers to favored purchasers. It has never suggested that the RPA reaches price discrimination merely because a disfavored purchaser, if given a better price, could compete more profitably against others who do not purchase the defendant's products. In secondary-line RPA cases, the former effect may be a cognizable competitive injury; the latter effect is not.

FTC v. *Morton Salt Co.*, 334 U.S. 37 (1948), held that the requisite competitive injury in a secondary-line RPA case occurs if a disfavored purchaser is "handicapped in competing

*with the more favored * * * purchasers* by the differential in price." *Id.* at 50 (emphasis added). "[D]ifferent prices for like goods *to competing purchasers* may have the defined effect on competition" if the discrimination "result[s] in price differentials *between competing purchasers* sufficient in amount to influence their resale price." *Id.* at 47 (emphasis added). "[C]ompetition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers." *Id.* at 50.

FTC v. *Sun Oil Co.*, 371 U.S. 505 (1963), also makes clear that the RPA protects competition between favored and disfavored purchasers, but not competition between disfavored purchasers and those who do not purchase the defendant's products. In that case, Sun, a gasoline refiner, sold its gasoline at a discount to McLean, a retail gas station operator, in order to allow McLean to compete more effectively against Super Test, a competing gas station operator that sold another refiner's gasoline. Sun did not provide the same discount to its other station operators, and they lost sales to McLean because of the difference in price. Even though the discount was extended to protect McLean's ability to engage more successfully in inter-brand competition against Super Test, it was held to violate the RPA. "It is the very operators of the other Sun stations which compete with McLean who are the direct objects of protection under the Robinson-Patman Act. The basic purpose of the Act was to insure that such *purchasers from a single supplier*, Sun, would not be injured by that supplier's discriminatory practices." *Id.* at 519 (emphasis added).

Falls City Industries, Inc. v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983), likewise focused on intra-brand competition, to the exclusion of inter-brand competition. The defendant sold Falls City beer to a wholesaler in Henderson County, Kentucky, at a lower price than it sold to a wholesaler across the river, in Evansville, Indiana. The lower wholesale price in Kentucky resulted in lower retail prices in Kentucky, and the evidence

showed that many Indiana consumers crossed the river to buy cheaper Falls City beer in Kentucky. This Court observed that "the competitive injury component of a Robinson-Patman Act violation is not limited to the injury to competition between the favored and the disfavored purchaser; it also encompasses the injury to competition between their customers – in this case the competition between Kentucky retailers and Indiana retailers." *Id.* at 436. But while intra-brand competitive effects were actionable, whether at the secondary-line or tertiary-line level, inter-brand competitive effects were not. Both the district court and the court of appeals found it likely that some or even most of the plaintiff's lost sales were attributable to inter-brand competition, *i.e.*, to "the marketwide decline of Falls City beer." *Id.* at 437. This Court recognized that the plaintiff could not recover for those losses to inter-brand competition, but held that, "if *some* of Vanco's injury was attributable to the price discrimination, Falls City is responsible *to that extent*." *Ibid.* (emphasis added).

In *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981), the majority and the dissenters disagreed about the sufficiency of the plaintiff's evidence of competitive injury – the majority remanded the case to the court of appeals for further consideration of that issue, while the dissenters would have affirmed the court of appeals' prior determination that the evidence was insufficient – but there was no disagreement about the kind of injury that was required. "A plaintiff must show, to recover damages for violation of § 2(a) that unlawful discrimination in price allowed a favored competitor to draw sales or profits from him, the unfavored competitor." *Id.* at 569-570 (Powell, J., dissenting).

In all of these cases, the requisite competitive injury was described in terms that coincide with the plain language of the statute. Proof of secondary-line competitive injury requires, at a minimum, proof of harm to competition with a "person who * * * knowingly receives the benefit of" the discrimination. 15 U.S.C. § 13(a).

In this case, the transactions involved in the sales-to-sales and offers-to-sales comparisons cannot support RPA liability for the simple reason that Reeder did not compete in any of these transactions against another Volvo dealer who "receive[d] the benefit of" the alleged discrimination. (The head-to-head comparisons cannot support RPA liability for other reasons that are addressed separately, below.) If sales or profits were diverted from Reeder in those transactions, they were diverted to non-Volvo dealers, not to another Volvo dealer who received a more favorable price. This effect on inter-brand competition is not the kind of competitive injury that the RPA requires. This failure to prove *competition* – an essential element of Reeder's RPA claim – is sufficient in itself to reverse as to all but one of the transactions at issue.

2. Reeder claims – and the Eighth Circuit seemingly agreed – that evidence of substantial price reductions to favored "competitors," over a substantial period of time, is sufficient to support an inference of the requisite competitive effect under *Morton Salt*. See Br. in Opp. 15; Pet. App. 15a-17a. But the decision in *Morton Salt* clearly does not authorize such an inference from the sales-to-sales and offers-to-sales transactions. In *Morton Salt*, five favored purchasers, retail chain stores, had "been able to sell Blue Label salt at retail cheaper than wholesale purchasers from respondent could reasonably sell the same brand of salt to independently operated retail stores, many of whom competed with the local outlets of the five chain stores." 334 U.S. at 41. The "Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than *their competitors* had to pay." *Id.* at 46-47 (emphasis added). That finding was supported by "testimony from many witnesses * * * that they had suffered actual financial losses on account of respondent's discriminatory prices. Experts were offered to prove the tendency of injury from such prices." *Id.* at 50. The Court held that this evidence adequately supported the FTC's finding and,

in *dicta*, suggested that the evidence went further than the Act required, because it was "self-evident * * * that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers." *Ibid.*

Nothing in *Morton Salt* suggests that this observation was meant to broaden the kind of competitive injury that could support RPA liability, by encompassing effects on inter-brand competition. The Court was addressing the kinds of evidence that would support an inference of competitive injury, not the nature of the injury that was required. That is clear from the Court's descriptions of the requisite competitive injury. See, *e.g.*, 334 U.S. at 50 (finding competitive injury because the disfavored "less-than-carload purchasers might have been handicapped in competing with the more favored carload purchasers"). It is also clear from the Court's description of the kind of evidence that would support a factual inference of competitive injury – evidence of sales at substantially different prices to "some customers" and to "the competitors of these customers." *Ibid.*

The sales-to-sales and offers-to-sales transactions cannot properly be regarded as instances in which Volvo sold at a lower price to Reeder's "competitors," so there is no basis for adopting the inference in the first place. See *Falls City*, 460 U.S. at 435 (the *Morton Salt* inference flows from "proof of a substantial price discrimination between competing purchasers over time"). And, even if an initial inference of competitive injury could be drawn merely because Reeder and other Volvo dealers competed as dealers in the same geographic area, that inference is unsustainable in light of the fact that Reeder faced no intra-brand competition in any of the specific transactions involved in the sales-to-sales and offers-to-sales comparisons. *Falls City* makes it clear that any initial inference under *Morton Salt* may be "overcome by evidence breaking the causal connection between a price differential and lost sales or profits." *Ibid.*

Nor does *Morton Salt* permit an inference of competitive injury from the head-to-head comparisons. Even if the RPA applied to those transactions (as we explain below, it does not, because those transactions do not involve discrimination between different "purchasers"), "[n]o inference of injury to competition is permitted when the discrimination is not substantial." 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 478-479 (5th ed. 2002) (citing cases). Reeder lost only one sale of twelve trucks to another Volvo dealer, a sale that would have generated $30,000 in gross profits for Reeder. Pet. App. 4a. Discrimination (if there is even that) in only one transaction over a five-year period, involving a bid to sell only twelve trucks (out of Reeder's bids to sell 5000 trucks in the relevant period), could not have a substantial effect on Reeder's business, let alone a substantial effect on competition between Reeder and favored Volvo dealers.

3. Injury to competition with favored purchasers cannot be inferred from Volvo's business strategy to reduce the number of dealers through which it sold trucks. First and foremost, as its language reflects, the RPA deals with "specific sales transactions" (*M.D. Rutledge* v. *Electric Hose & Rubber Co.*, 511 F.2d 668, 677 (9th Cir. 1975)), not general distribution strategies.

Moreover, contrary to the Eighth Circuit's misconception, see Pet. App. 19a, the antitrust laws generally do not interfere with a manufacturer's decision to limit the number of firms that distribute its products. Under the Sherman Act, a manufacturer's outright refusal to deal with a potential distributor is actionable only in the most extraordinary circumstances. See *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). But while the Sherman Act can reach refusals to deal, albeit rarely, the RPA does not reach them at all. See, *e.g.*, FREDERICK M. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT § 4.1, at 45-48 (1962) (discussing cases holding that "an outright refusal to sell to one customer cannot constitute a Robinson-Patman violation"); 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOP-

MENTS, *supra*, at 465 n.64 (citing cases). The RPA addresses discrimination, not termination. It places no restraints on a manufacturer's freedom to choose the number, the identity, the location, or the characteristics of distributors to which it will sell or on a manufacturer's freedom to terminate any distributor at will. That is true even though a refusal to deal or the termination of an existing distributor is "different" treatment (and thus "discrimination" in a sense), because Section 2(a) prohibits only discrimination "in price."

Volvo's business strategy does not even suggest a plausible motive for price discrimination, much less provide evidence of the competitive effect that is required. Reeder's claim is predicated on Volvo's ability to offer different prices for different bids. In a market environment in which it could discriminate between bids, Volvo had no logical reason to offer high prices to Reeder in transactions in which Reeder was competing only against non-Volvo dealers. Such behavior would merely divert sales and profits from Volvo to other truck manufacturers. Courts should not infer anticompetitive effects based on the implausible assumption that a business will engage in conduct that will "generate losses * * * with no corresponding gains." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 595 (1986). See Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, in *Symposium: Antitrust at the Millennium*, 68 ANTITRUST L.J. 125, 126 (2000) ("[A] manufacturer cannot profit by weakening its own distribution system or reducing that system's competitiveness.").

4. Careful adherence to the statutory language that limits the scope of the prohibition against price discrimination is especially important. If price discrimination is treated as unlawful merely because a disfavored buyer could compete more profitably in inter-brand competition if it paid a lower price, then virtually all price discrimination will be unlawful. But for the "discrimination" (*i.e.*, if it merely paid a lower price to its supplier), every disfavored buyer could earn a higher profit

margin on each unit it buys and resells or (by passing through the lower prices to its own customers) could resell more units without reducing its profit per unit. This is the "injury" that Professor Hovenkamp describes when he says that a "higher purchase price * * * would injure any purchaser of an input." See p. 16, *supra*.

A decision that such "injuries" are cognizable would radically extend the reach of the RPA. When properly construed to address only competition between favored and disfavored purchasers, the RPA limits a seller's ability to charge different prices in different transactions, but does not completely eliminate that pricing flexibility.[5] That is because, in many markets, price "discrimination" will have no discernible effect on competition between favored and disfavored purchasers. In some markets – including the heavy truck market, in which Reeder competed against another Volvo dealer only two times in a five-year period – inter-brand competition is fierce but intra-brand competition is extremely limited. Properly construed, the RPA permits sellers in such markets to offer selective price reductions that promote inter-brand competition with little risk of RPA liability because competition between "favored" and "disfavored" purchasers is so limited. Moreover, the antitrust laws generally permit sellers to limit the extent of intra-brand competition when such limitations will promote inter-brand competition. For example, manufacturers may grant exclusive distribution rights for defined geographic areas or classes of customers. Antitrust law recognizes that such vertical restrictions on intra-brand competition can enhance inter-brand competition for the benefit of consumers. See, *e.g.*, *Continental T.V., Inc.* v. *GTE*

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[5] As the National Association of State Directors of Pupil Transportation Services – a group of *buyers* of school buses representing consumer interests – observed in its cert.-stage *amicus* brief, such flexibility can have palpable consumer benefits. See Brief of *Amicus Curiae* the National Association of State Directors of Pupil Transportation Services in Support of Petitioner (Feb. 3, 2005).

Sylvania, Inc., 433 U.S. 36 (1977). See generally 14 HOVENKAMP, *supra*, ¶ 2301. When intra-brand competition is limited by such contractual arrangements, a manufacturer can engage in selective discounting to compete against other brands, without affecting (the non-existent) competition between its own distributors. Properly construed, the RPA does not prohibit such discounting, but under Reeder's improper construction the discounting could result in RPA liability to the "disfavored" distributor because of the phantom "injury" it suffers in inter-brand competition.

There is no reason to fear that competition or consumers will be harmed by the price discrimination that is permitted when the RPA is confined to its proper sphere. Precisely the opposite is true. Competition will be harmed by overly expansive application of the RPA. Economists and antitrust scholars have long recognized that competition is generally harmed, and consumers are made worse off, if manufacturers cannot selectively discount their products. See Hovenkamp, *supra*, 68 ANTITRUST L.J. at 127 ("[W]henever anyone takes a longer view than the shortest one possible, incentive discounts further, rather than injure, competition."); 1 ABA SECTION OF ANTITRUST LAW, THE ROBINSON-PATMAN ACT: POLICY AND LAW 29 (Paul H. LaRue, et al., eds. 1980) ("[P]rices may be made more fluid and the general price level in the market lowered if the suppliers can vigorously pursue selected buyers with discounts and if major purchasers can use their countervailing power to force producers to grant price concessions.") (citing U.S. DEP'T OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT 63-64 (1976)). Judge Bork has noted that "adjustment to shifting costs and demand is socially desirable, and it is best that appropriate responses be made as quickly and sure-footedly as possible." ROBERT H. BORK, THE ANTITRUST PARADOX 388 (1978). "[R]igid" prices and markets that are "less sensitive to changing demands and costs" are an unhappy result of precluding sellers from "rais[ing] or lower[ing] prices selectively." *Ibid.* See also *id.* at 389-390 (describing pricing flexibility as a protection

against cartel behavior). Professor Hovenkamp's treatise summarizes the "voluminous literature" on the means by which price-discrimination laws, if wrongly construed, can "facilitate price rigidity, including oligopoly and collusion." 14 HOVENKAMP, *supra*, ¶ 2340b1, at 121-123.

This Court has cautioned that interpretations of the RPA that "'extend beyond the prohibitions of the Act * * * help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation.'" *Great Atl. & Pac. Tea Co.* v. *FTC*, 440 U.S. 69, 80 (1979) (quoting *Automatic Canteen Co. of Am.* v. *FTC*, 346 U.S. 61, 63 (1953)). Just last year, the Court refused to extend the reach of Section 2 of the Sherman Act (a statute whose broad language affords considerable judicial latitude) to require a defendant with monopoly power to comply with specific legal obligations that were imposed by Congress to eliminate the monopoly. See *Verizon* v. *Trinko*, 540 U.S. at 411-416 (refusing to create another exception to the general rule that Section 2 of the Sherman Act imposes no duty to aid competitors). There is even less reason to extend the reach of the RPA here, where an extension would contravene specific language in the statute, where the defendant is a small competitor in an intensely competitive market,[6] and where extension of the statutory prohibition would deter procompetitive behavior that benefits consumers.

II. Robinson-Patman Liability Cannot Arise From A Transaction In Which The Plaintiff Did Not Purchase From The Defendant

Reeder's evidence showed that it lost only one sale to another Volvo dealer – the sale of twelve trucks to Hiland Dairy. The Hiland Dairy transaction cannot support a judgment against Volvo because Reeder did not purchase trucks from

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[6] Volvo has about a 10% market share. See http://www.todaystrucking.com/trucksales-us.cfm.

Volvo in that transaction and because the RPA prohibits only discrimination "between different purchasers."[7]

That conclusion is plain enough from the clear language of the statute, as the lower courts and authoritative antitrust treatises have recognized time after time. In one of the earliest applications of the RPA, *Shaw's, Inc.* v. *Wilson-Jones Co.*, 105 F.2d 331 (3d Cir. 1939), the Third Circuit explained that, for there to be a violation of the RPA, "at least two purchases must have taken place. The term purchaser means simply one who purchases, a buyer, a vendee. It does not mean one who seeks to purchase, a person who goes into the market-place for the purpose of purchasing. In other words, it does not mean a prospective purchaser, or one who wishes to purchase." *Id.* at 333.

Since *Shaw's,* the two-purchase requirement has been recognized as a bright-line rule that has guided businesses seeking to comply with the RPA and courts addressing the Act's basic scope. In 1962, the leading treatise on the RPA identified "consummated contemporaneous sales transactions" as one of the "basic statutory requirements," "[s]ince no actionable price discrimination can arise until two completed transactions occur." ROWE, *supra*, § 4.1, at 45 (discussing cases applying the two-purchase requirement). Another leading treatise, in

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[7] There are other reasons that this transaction cannot support RPA liability as a matter of law, even if Reeder could circumvent the two-purchase requirement. As we explained previously (p. 21, *supra*), discrimination in one small transaction over a five-year period cannot have a "substantial[]" effect on competition, as the language of Section 2(a) requires, even if the effect on a competitor counts as an effect on "competition." See generally 3 KINTNER & BAUER, *supra*, § 22.6. Moreover, Reeder failed to demonstrate that the discount that Volvo granted to Southwest Missouri Truck Center to close the sale would not have been granted to Reeder if Hiland Dairy had indicated a desire to purchase from Reeder, rather than Southwest. Cf. *Metro Ford Truck Sales, Inc.* v. *Ford Motor Co.*, 145 F.3d 320 (5th Cir. 1998) (no discrimination if discounts were functionally available to competing truck dealers), cert. denied, 525 U.S. 1068 (1999).

1983, noted that "there must be at least two actual 'purchases,' in the sense of consummated sales transactions; it is not enough that there be one sale at a low price, and one offer, which was refused (and therefore led to no consummated sale), at a higher price." 3 EARL W. KINTNER & JOSEPH P. BAUER, *supra*, § 21.11 at 192; accord *id.* § 20.5, at 124 ("[T]here must be two actual sales at different prices. If two general contractors request bids from the same subcontractor for identical work and the subcontractor submits an inflated bid to one, but not the other, there is no Robinson-Patman Act problem until and unless a sale has taken place to the disfavored general contractor."). Professor Hovenkamp, in 1999, explained that "[a]n unaccepted or uncompleted offer occurs when the seller is willing to quote a price, howbeit a higher price than the seller is charging other buyers, but the plaintiff fails to purchase the product. Clearly, an unaccepted or uncompleted offer is not a sale; nor is a price quotation that is not followed by a purchase, even if the result of the higher quote is that the plaintiff loses a bid." 14 HOVENKAMP, *supra*, ¶ 2300, at 27 (footnotes omitted).

The two-purchase rule prevents the application of the RPA in competitive bidding situations like the one presented here. In two circuits, the rule has been invoked to reject RPA claims when a seller offered different prices to two firms that were bidding against each other for a sale, but only one of those firms ultimately purchased from the defendant. *Terry's Floor Fashions, Inc.* v. *Burlington Indus., Inc.*, 763 F.2d 604 (4th Cir. 1985); *M.C. Mfg. Co.* v. *Texas Foundries, Inc.*, 517 F.2d 1059 (5th Cir. 1975), cert. denied, 424 U.S. 968 (1976).

But competitive bidding situations constitute only one of many ways in which the two-purchase rule is woven into the fabric of RPA jurisprudence. The rule also precludes RPA liability for discrimination involving leases, licenses, product exchange transactions, and consignment arrangements. See, *e.g.* *Seaboard Supply Co.* v. *Congoleum Corp.*, 770 F.2d 367, 373 (3d Cir. 1985) (consignments); *Export Liquor Sales, Inc.* v. *Ammex Warehouse Co.*, 426 F.2d 251, 252 (6th Cir. 1970)

(leases), cert. denied, 400 U.S. 1000 (1971); *LaSalle Street Press, Inc.* v. *McCormick & Henderson*, 293 F. Supp. 1004, 1005 (N.D. Ill. 1968) (patent license agreement), aff'd, 445 F.2d 84 (7th Cir. 1971). It has been applied when sellers have engaged in outright refusals to sell at any price to a prospective buyer because, even if the refusal is discriminatory, a refusal to sell does not lead to a purchase. See *Black Gold, Ltd.* v. *Rockwool Indus., Inc.*, 729 F.2d 676, 682-683 (10th Cir.), cert. denied, 469 U.S. 854 (1984); *Shaw's*, 105 F.2d at 333-334. Courts also have held that there is no "purchase" that can evidence discrimination between two purchasers when goods are transferred between corporations that are both part of a single enterprise (*e.g.*, transfers from a parent corporation to its subsidiary). See 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS, *supra*, at 466 n.67 (citing cases).

The application of the two-purchase rule in so many contexts merely highlights the fact that "discrimination" (when construed to mean only a "difference") is pervasive and generally *desirable* in a market economy, because it is an essential mechanism through which more efficient arrangements are encouraged and less efficient arrangements are discouraged. It would be astounding if Congress attempted broadly to require businesses to adopt uniform terms for dealing with all, across the entire spectrum of commercial negotiations and transactions that comprise interstate commerce. Nothing in the text of the RPA suggests that Congress meant to do so.

The circumstances of the Hiland Dairy transaction illustrate why. See p. 7, *supra*. If Volvo had refused to increase the discount to Southwest in order to secure the sale to Hiland, Reeder would have gained no benefit, but Volvo, Southwest, and Hiland would have been harmed – Volvo and Southwest because they probably would have lost a sale to another truck manufacturer and its dealer, and Hiland because it certainly would have lost the benefit of the lower price and probably would have lost the benefit of purchasing the brand of trucks

that it evidently preferred. Volvo could have put off a response to Southwest and Hiland until after it offered a similar discount to Reeder, but there is no good reason to require such delay when it is clear, as it was here, that the retail customer had already decided to buy from Southwest rather than Reeder. At best, the delay would permit an empty formality; at worst, it would risk loss of the sale to another manufacturer. Volvo's pricing reflects an effort to compete more effectively against other manufacturers, not an effort to favor one dealer over another. Volvo sought a goal that is laudable as a matter of antitrust policy, using means that are not prohibited by the terms of the RPA.

III. The RPA Requires Proof Of A Causal Relationship Between The Discrimination Against A Purchaser And The Competitive Injury, Not Merely That Plaintiff Has The "Status" Of A Purchaser Or Of A Competitor To A Favored Purchaser

Reeder has never cited any authority that contradicts the principles discussed above. Its strategy, so far, has relied on sleight-of-hand. To show that it was a purchaser, it points to transactions in which it did not compete against another Volvo dealer. To show that it competed against other Volvo dealers, it points to transactions in which it did not purchase from Volvo. To show that there was discrimination, it points to transactions in which it did not compete against other Volvo dealers and transactions in which it did not purchase from Volvo. Treble-damage liability under the RPA requires more than this shell game.

1. A violation of Section 2(a) can occur only if there is a particular kind of discrimination, a particular kind of competitive effect, and a causal relationship between that discrimination and that competitive effect. That requirement is expressed clearly in the language of the statute, which prohibits only discrimination "between different purchasers," and prohibits that kind of discrimination only if the "effect of such discrimination"

is harm to competition with a person who "receives the benefit of such discrimination." In other words, the discrimination must *cause* the competitive effect. This causal relationship can be shown by direct evidence that price differences resulted in displaced sales or it may be inferred, under *Morton Salt*, from substantial price differences over time. But an inference under Morton Salt cannot survive evidence "breaking the causal connection between a price differential and lost sales or profits." *Falls City*, 460 U.S. at 435. "[T]he requirement of a *causal* connection between the challenged price differential and the claimed substantial competitive impairment" is "of paramount significance." ROWE, *supra*, § 6.8, at 139. "Unless that causal nexus between the price and the detriment appears, the challenged pricing practice is valid as not *legally responsible* for any asserted competitive dislocation." *Ibid.*; see also *id.* § 7.5, at 163-168 (citing and discussing cases).

Because the statute requires a cause-and-effect relationship, a plaintiff's mere status as a purchaser, in transactions in which there can be no competitive injury because there is no competition with a favored purchaser, is insufficient. So, too, is mere status as a competitor in a context in which there has been no discrimination between purchasers. There can be no cause-and-effect relationship – and hence no violation of Section 2(a) – if the discrimination between purchasers occurs only in transactions that are entirely unrelated to the transactions in which there is competition between favored and disfavored purchasers.

2. Recovery of damages requires more than proof of a violation of the RPA. As this Court has held, plaintiffs seeking damages must also prove that they have standing to sue under Section 4 of the Clayton Act. *J. Truett Payne*, 451 U.S. at 561-563. To establish standing, they must prove actual injury, and they must prove "a causal connection between the price discrimination in violation of the Act and the injury suffered." *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 648 (1969). The injury must be "attributable to something the antitrust laws were designed

to prevent." *J. Truett Payne*, 451 U.S. at 562. It must be an injury "that flows from that which makes the defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), cited in *J. Truett Payne*, 451 U.S. at 562.

To recover damages for RPA violations, the injury must flow from the difference between the prices paid by favored and disfavored purchasers, because that difference in price to two purchasers is a *sine qua non* for the conduct to be illegal. Reeder cannot satisfy this standing requirement. Reeder's success or failure in the transactions encompassed by the offers-to-sales and sales-to-sales comparisons, in which Reeder competed only against non-Volvo dealers, could not have been affected by the prices charged to Volvo dealers in other, unrelated transactions. The profits Reeder earned in the offers-to-sales and sales-to-sales transactions may have been affected by the prices at which Volvo offered or sold trucks to Reeder, and by the prices at which other manufacturers (*e.g.*, Freightliner or Kenworth) offered or sold their trucks to the dealers that were competing against Reeder. But it was the absolute level of Volvo's prices to Reeder (and of other truck manufacturers' prices to their dealers) that mattered, not whether the price to Reeder differed from the price to another Volvo dealer in an unrelated transaction. Reeder's sales and profits in those transactions would have been the same if Volvo's prices to other dealers had been exactly the same as its prices to Reeder or, for that matter, even if prices to other Volvo dealers were *higher* than the prices to Reeder. If Reeder suffered any injury, it did not flow from the *discrimination* in price between Reeder and non-competing Volvo dealers. Reeder's "injury" – the kind of injury that any buyer suffers merely from paying a higher price rather than a lower price – does not confer standing to sue for damages under Section 4 of the Clayton Act.

IV. The Court Can Also Reverse The Judgment Below On The Ground That The RPA Does Not Protect Against Mere Injury To A Competitor, When There Is No Reasonable Possibility Of Injury To "Competition" With Favored Purchasers

Courts of appeals have long been divided on whether the RPA requires proof of injury to "competition" in secondary-line cases, or whether injury to individual *competitors* is sufficient.[8] Even if injury to a competitor is sufficient, Reeder's failure to identify any transaction in which Volvo discriminated between competing purchasers provides ample reason to reverse the decision below, for the reasons explained above. However, this case presents an opportunity for the Court to address the conflict among circuits, and to correct a misreading of the RPA that has unnecessarily placed it at cross purposes with other provisions of the antitrust laws, by reiterating that injury to a competitor, when there is no reasonable possibility that competition will be injured, does not constitute a cognizable injury under the RPA. That principle provides a further reason to reverse the judgment below.[9]

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[8] The D.C. Circuit, in *Boise Cascade Corp.* v. *FTC*, 837 F.2d 1127 (D.C. Cir. 1988), emphasized the need to avoid unnecessary inconsistencies between the RPA and other antitrust statutes that are construed to promote "pro-competitive efficiency and maximization of consumer welfare." *Id.* at 1138. Therefore, the D.C. Circuit held that injury to *competition* is required. *Id.* at 1143. The Ninth Circuit has explicitly disagreed with *Boise Cascade*, holding that "the inference of competitive injury that arises from proof of injury to a competitor may not be rebutted by evidence that competition was not adversely affected." *Chroma Lighting* v. *GTE Prods. Corp.*, 111 F.3d 653, 655 (9th Cir.), cert. denied, 522 U.S. 943 (1997). The Third Circuit has reached the same conclusion. *J.F. Feeser, Inc.* v. *Serv-A-Portion, Inc.*, 909 F.2d 1524 (3d Cir. 1990), cert. denied, 499 U.S. 921 (1991).

[9] Although this issue was not explicitly raised in terms by the Questions Presented in the petition for a writ of certiorari, the petition (at 16 n.3) identified the circuit split and observed that the split "could be resolved through a grant of certiorari in this case." The question is closely enough linked to the issues that *were* raised in explicit terms in the Questions Presented that the Court's precedents would amply justify reaching the issue, if the Court so chose. See *City of Sherrill* v. *Oneida Indian Nation*, No. 03-855, slip op. 14 n.8 (March 29, 2005); *Ballard* v. *Commissioner*, No. 03-184, slip op. 4 n.2 (March 7, 2005); *R.A.V.* v. *City of St. Paul*, , 505 U.S. 377, 381 n.3 (1992). See generally ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 6.25(f), at 414 (8th ed. 2002) ("Questions not explicitly mentioned but essential to analysis of the decisions below or to the correct disposition of the other issues have been treated as subsidiary issues fairly comprised by the question presented." (internal quotation marks omitted)). At the same time, as we noted in the petition, the Court can easily reverse without reaching this issue, if that is the path the Court chooses. We respectfully submit that, in the Court's first secondary-line case under the RPA since 1990, it would be beneficial to the bar and the lower courts for the Court to address this issue.

This Court has already held, in *Brooke Group*, that the RPA does not encompass mere injury to competitors. "By its terms, the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition." 509 U.S. at 220. Whether price discrimination "may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'" *Id.* at 224 (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962) (emphasis in original)). Despite this clear statement, some courts have disregarded *Brooke Group*, a case involving primary-line price discrimination and below-cost price discrimination, when deciding secondary-line cases brought by distributors rather than competitors.

There is no basis for that distinction in the opinion in *Brooke Group*; in holding that the RPA, like other antitrust statutes, required injury to competition rather than merely injury to competitors, *Brooke Group* cited (509 U.S. at 220) two secondary-line RPA cases, *Great Atlantic & Pacific Tea Co.*, 440 U.S. at 80 n.13, and *Automatic Canteen*, 346 U.S. at 63, 74.

Moreover, the same misunderstanding of "competition" that currently prevails in some of the lower courts in secondary-line cases also prevailed in some of the lower courts in *primary*-line cases before this Court cleared up the confusion in *Brooke Group*. Specifically, *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967), had "often been interpreted to permit liability for primary-line price discrimination on a mere showing that the defendant intended to harm competition or produced a declining price structure." *Brooke Group*, 509 U.S. at 221. The Court noted criticism of that decision "on the grounds that such low standards of competitive injury are at odds with the antitrust laws' traditional concern for consumer welfare and price competition." *Ibid.* And the Court acknowledged that *Utah Pie* was but "an early judicial inquiry in this area." *Ibid.* The Court's punch line: "As the law has been explored since *Utah Pie*, it has become evident that primary-line competitive injury under the Robinson-Patman Act is of the same general character as the injury inflicted by predatory pricing schemes under § 2 of the Sherman Act." *Ibid.* So too here, as the law has been explored since *Morton Salt* with its *dicta*, it has become evident that secondary-line competitive injury under the RPA is of the same general character as the injury inflicted by the few vertical practices condemned by the Sherman Act. See 14 HOVENKAMP, *supra*, ¶ 2301. The statutes may differ in degree, see *Brooke Group*, 509 U.S. at 222, but an altogether different kind of injury – pro-consumer, pro-competitive price cuts that harm only a discrete middleman – should not be cognizable under the RPA, even in secondary-line cases.

There is, furthermore, no support in the language of the RPA or in its legislative history for an antitrust-like construction of "competition" in primary-line cases and an anti-consumer, pro-competitor construction of the same word in secondary-line cases. The RPA requires injury to competition in secondary-line cases, just as it does in primary-line cases.

1. The language of the RPA leaves little, if any, doubt that the statute protects competition, rather than the welfare of any individual competitor. Congress easily could have proscribed price discrimination that injures "any person" or, more narrowly, "any competitor of" a "person who * * * knowingly receives the benefit of" the discrimination. Congress chose, instead, to require an injury to "competition."

If there were any ambiguity in that language – and we submit that there is none – such ambiguity is easily resolved by the application of basic principles of statutory interpretation. The word "competition" was used throughout the Clayton Act as originally enacted; when Congress in 1936 amended Section 2 of the Clayton Act by enacting the RPA, it chose to use the word "competition" again. "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Savings Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (citations omitted). When an amendment to a statute uses a word that is used elsewhere in that statute, the word should be construed to have the same meaning throughout. Under this principle, the word "person" has the same meaning under the RPA that it has under the Clayton Act. *Jefferson Cty. Pharmaceutical Ass'n* v. *Abbott Labs.*, 460 U.S. 150, 156 (1983) ("We do not perceive any reason to construe the word "person" in that Act [the RPA] any differently than we have in the Clayton Act, which it amends."); see also *id.* at 156 n.13 (discussing legislative history of the RPA indicating that terms used in the RPA have the same meaning they have when used elsewhere in the Clayton Act). The word "competition" should also be construed consistently. And, as noted in *Brown Shoe*, in what may be the most frequently quoted axiom in all of antitrust jurisprudence, the word "competition" when used elsewhere in

the antitrust laws means something very different from the word "competitor." 370 U.S. at 320.

This straightforward linguistic analysis carries special force in the context of the RPA, where inconsistent interpretations of the same word produce incoherent antitrust policy. This Court properly construes statutes "to make sense rather than nonsense out of the *corpus juris*." *West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 101 (1991). It has suggested, time after time, that other provisions of the antitrust laws should be considered when interpreting the RPA because an unwarranted expansion of the RPA's coverage will undermine policies reflected in other provisions of the antitrust laws. See *Brooke Group*, 509 U.S. at 220; *Texaco Inc.* v. *Hasbrouck*, 496 U.S. at 568 n.27; *Great Atl. & Pac. Tea Co.*, 440 U.S. at 80; *Automatic Canteen*, 346 U.S. at 63. This desideratum of consistency with the broader policies of the antitrust laws was tied directly to the conclusion, in *Brooke Group*, that "Congress did not intend [for the RPA] to outlaw price differences that result from or further the forces of competition." 509 U.S. at 220.

Some 50 years ago, but after *Morton Salt*, a blue-ribbon committee appointed by the Attorney General of the United States concluded that judicial decisions and the statutory language supported a requirement that

> analysis of the statutory "injury" center on the vigor of competition in the market rather than hardship to individual businessmen. * * * Incidental hardships on individual businessmen in the normal course of commercial events can be checked by a price discrimination statute only at the serious risk of stifling the competitive process itself.

REPORT OF THE U.S. ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 164 (Mar. 31, 1955). A highly respected antitrust scholar described the committee's effort as a "good try" that "did not gain judicial acceptance." Thomas E. Kauper, *The Report of the Attorney General's National Committee to Study the Antitrust Laws: a Retrospective*, 100 MICH. L. REV. 1867, 1885 (2002). *This* Court, however, has never rejected the committee's approach. And the lower court cases that reject the approach are, as we will show below, based on a misreading of legislative history, inconsistent with this Court's precedents concerning statutory interpretation in general, and inconsistent with this Court's precedents concerning the RPA in particular.

If properly construed to protect competition, not merely a competitor, the RPA would prevent discrimination in "the case mainly contemplated by the framers of the Robinson-Patman Act; namely, the very powerful buyer or dealer who is able to force a supplier to behave contrary to its independent best interest." 14 HOVENKAMP, *supra*, ¶ 2342c, at 132. A powerful purchaser, by exercising its buying power, may be able to induce discrimination that injures intra-brand *competition* in the market served by the powerful purchaser, an effect that is harmful to rival buyers, to the seller who is induced to discriminate against its own interests, and to the ultimate consumers of the seller's products. See *ibid.* The statute's reference to injury to competition with a favored purchaser who "knowingly" receives the benefit of discrimination supports the view that the statute was meant to address this situation. See *id.* ¶ 2342e, at 141 ("The best explanation of this generally ignored scienter requirement is that Congress's concern in adding the third injury section was with price discriminations induced by large buyers * * *.").

2. Those who have concluded that the RPA protects competitors, rather than competition, usually rely on a selective reading of the RPA's legislative history. That reliance is misplaced. Legislative history cannot override the straightforward language of the statute. See, *e.g.*, *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). In any case, the RPA's legislative history does *not* prove that Congress meant to protect against injury to a competitor in circumstances in which competition would not be injured.

The passage of the RPA reflected a congressional judgment that the prohibition against price discrimination in Section 2 of the original Clayton Act did not adequately protect competition. Among other things, Section 2 originally required proof that the effect of the discrimination "may be substantially to lessen competition or tend to create a monopoly *in any line of commerce.*" The RPA modified that requirement by permitting proof of injury to "competition with any person who * * * knowingly receives the benefit of such discrimination." Under this modification, it is sufficient to prove harm to intra-brand competition, rather than harm to competition in a "line of commerce" that would encompass both intra-brand and inter-brand competition. The modification, by its terms, does not encompass harm to an individual *competitor* when intra-brand *competition* would not be injured.

Those who claim that Congress intended for the RPA to protect competitors, not competition, usually rely on the House and Senate reports, not the language of the statute, to support their conclusion. See, *e.g.*, *Boise Cascade*, 837 F.2d at 1153 (Mikva, J., dissenting); *Chroma Lighting*, 111 F.3d at 656. Those reports used nearly identical language in describing how the Act would affect existing law. See H.R. REP. NO. 74-2287, pt. 1, at 8 (1936); S. REP. NO. 74-1502, at 4 (1936). As the Senate report explained, the new injury requirement

> accomplishes a substantial broadening of a similar clause now contained in section 2 of the Clayton Act. The latter has in practice been too restrictive, in requiring a showing of general injury to competitive conditions in the line of commerce concerned; whereas the more immediately important concern is in injury to the competitor victimized by the discrimination. Only through such injuries, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower.

This explanation acknowledges the obvious point that injury to competitors is a prerequisite for injury to competition, but

does not suggest – as some judges of lower courts have believed, and as *dicta* in *Morton Salt*, 346 U.S. at 49 & n.18, may have helped them to believe – that *every* injury to a competitor will *necessarily* produce an injury to competition. Not every seed comes to flower. And, although the Senate report indicates that the amended Clayton Act was meant to "catch the weed in the seed," the report was, after all, explaining a law that addressed anticompetitive effects in their incipiency – a statute that "does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect." *Corn Prods. Ref. Co.* v. *FTC*, 324 U.S. 726, 742 (1945); accord *Brooke Group*, 509 U.S. at 222. The language of the Senate and House reports is perfectly consistent with a natural reading of the language of the statute that makes actionable a new kind of competitive injury: injury to competitors if, but only if, there is a "reasonable possibility" that such injury will lead to harm to intra-brand competition. In other words, "the purpose of the statute was not to reach the injury to a competitor for its own sake, but to use such injury to a competitor to predict that the larger, more general injury to competition would follow." 14 HOVENKAMP, *supra*, ¶ 2333, at 99.

To be sure, some of those who supported enactment of the RPA may have believed that price discrimination was inherently harmful to competition or that competition could flourish only if small businesses were protected from larger and more efficient competitors. Such beliefs do not distinguish the Congress that enacted the RPA from other Congresses that enacted other provisions of the antitrust laws, and therefore do not call for any more blindered interpretation of "competition" in the RPA. Similar concerns are apparent in the legislative history of the Sherman Act, the original Clayton Act, and the 1950 amendments to the Clayton Act. See Hovenkamp, *supra*, 68 ANTITRUST L.J. at 130-132 (discussing populist motivations underlying antitrust laws).

Judicial interpretations of these other antitrust laws, however, have recognized that the concept of "competition" should

not be constrained by economic and political theories of the distant past, because Congress adopted statutory language that invites common-law development of antitrust principles as the business environment changes and as economic learning advances. The same invitation is apparent from the use of the term "competition" in the RPA. There is no more reason for courts construing the RPA to be bound by individual legislators' economic theories about "competition" in 1936, than there is for courts construing the Sherman Act to be bound by legislators' theories about "restraint of trade" (15 U.S.C. § 1) in 1890, or for courts construing Section 7 of the Clayton Act, 15 U.S.C. § 18, to be bound by legislators' theories about mergers' effects on "competition" in 1950.[10]

3. The factual inference authorized by *Morton Salt* does not require extension of the Act to protect competitors, in circumstances in which there is no reasonable possibility that competition will be injured. *Morton Salt* indicated that substantial price differences over time would be sufficient to support a finding of injury to "competition." See 334 U.S. at 47 (evidence supported FTC findings that the effect of discrimination may be injury to "competition"); *id.* at 50 (FTC was justified in finding that "competition" might have been injured). The financial harm to individual competitors who had

[10] The misuse of legislative history is apparent from the *Boise Cascade* dissent. Quoting only committee reports, not the words of the statute, the dissenting judge insisted that "Congress" had stated its intent "clearly." 837 F.2d at 1158. Of course, Congress does not vote on reports, only on bills, so any clear expression was merely by some subset of Members (at most). Even worse, the Third and Ninth Circuits relied on "the floor statement of a congressman in charge of the Conference Report." *Chroma Lighting*, 111 F.3d at 656 (citing *J.F. Feeser*, 909 F.2d at 1533). Worst of all, as we have explained in text, the quoted legislative history need not be read to contradict the natural reading of the statutory language – the word "competition" – that would harmonize the language with the rest of antitrust law, yet several courts and individual judges have so read it.

to pay more was not, itself, deemed to be constitute the relevant injury; the Court indicated that substantial price differences supported an inference of injury to the "competitive opportunities" of disfavored merchants. *Id.* at 46. See also *J. Truett Payne*, 451 U.S. at 561 (plaintiff not entitled to "automatic damages" measured by the amount of the discrimination).

Even under a broad reading of *Morton Salt* that would permit the requisite injury to competition to be inferred from injury to individual competitors, there is no reason to treat that inference as one that is irrebuttable. This Court has held that the inference *can* be rebutted. *Falls City*, 460 U.S. at 435. As Judge Starr explained for the court in *Boise Cascade*, "Robinson-Patman has not ushered in a bizarre rule of law that exalts theory 'no matter what' in the face of hard, cold facts." 837 F.2d at 1146. The words of the statute, its legislative history, and *Morton Salt* are congruent with the principle consistently applied in other antitrust cases: When there is no reasonable possibility that an injury to competitors will produce injury to competition, there is no violation of the law.

4. Reeder's evidence falls far short of showing an injury to intra-brand "competition" with other Volvo dealers, let alone a broader injury to "competition" in any "line of commerce" that encompasses competition among Volvo and non-Volvo truck dealers. Reeder's evidence shows that Volvo's dealer network was competitive both in structure and in behavior. Volvo had 146 dealers in 1997, and the "Volvo Vision" business strategy, if and when fully implemented, would have retained 75 Volvo dealers across the country. Pet. App. 3a. As Reeder itself points out, Volvo's dealers were free to sell to customers anywhere in the country. There was no evidence suggesting that customers would be unable to attract competitive bids from multiple Volvo dealers if they wanted to do so. Dealer profit margins were narrow, and dealers were selling Volvo trucks in large quantities; 1999 was a record year for dealers' sales of Volvo trucks. Pet. App. 16a-17a.

Reeder offered no explanation of how Volvo could possibly benefit by reducing the competitiveness of its dealers.

> Antitrust analysis generally assumes that the manufacturer is best off when its distribution system as a whole distributes the largest possible output at the lowest possible markup. As a result, when a supplier makes an independent choice to charge higher prices to smaller or less aggressive or more poorly placed dealers, we cannot presume that the supplier is acting so as to make its distribution function in a less competitive manner.

Hovenkamp, *supra*, 68 ANTITRUST L.J. at 126. Such a presumption is especially inappropriate when the dealer who pays the "higher" price is not competing for the same customer as the dealer who pays the lower price. The price differential in such circumstances may simply reflect the fact that the manufacturer has less reason to offer price concessions to attract the business of certain retail customers – perhaps because sales to those customers are likely without discounts or because they provide less value to the manufacturer – and that the "disfavored" dealer's sales efforts are disproportionately focused on those retail customers. Conversely, larger discounts may be a way for the manufacturer to encourage more intensive efforts by its dealer to sell to other retail customers, who would otherwise turn to a different manufacturer's products or who are particularly valuable customers.

The absence of any plausible anticompetitive motivation in this case is coupled with behavior – Volvo's *reduction* of prices to induce truck users to buy Volvo trucks, rather than trucks produced by other manufacturers – that manifestly enhanced the competitive prospects of Volvo dealers when they competed against non-Volvo dealers. Volvo's so-called discrimination could hardly have injured intra-brand competition because, for all practical purposes, Reeder did not even engage in intra-brand competition. If Reeder suffered any injury at all, it was merely the injury of paying more than it would have liked. That

"injury" to a competitor does not constitute an injury to competition and is insufficient to support a judgment that Volvo acted in violation of the RPA.

* * * * *

Over the course of more than four decades, this Court has emphasized adherence to the language of the RPA, frequently noting that faithfulness to the statute's language is especially important because expansion of the Act's coverage would operate to the detriment of consumers and the goals of other provisions of the antitrust laws. See *Brooke Group*, 509 U.S. at 220; *Texaco Inc.* v. *Hasbrouck*, 496 U.S. at 568 n.27; *Great Atl. & Pac. Tea Co.*, 440 U.S. at 80; *Automatic Canteen*, 346 U.S. at 63. Lower courts, unfortunately, have often failed to heed those admonitions. See, *e.g.*, Hovenkamp, *supra*, 68 ANTITRUST L.J. at 143 ("Robinson-Patman case law maintains an excessively broad conception of competitive injury because it has ignored important constraints that are explicit in that statute's own language and legislative history. The courts have taken a piece of legislation that was anticompetitive enough and made it even more anticompetitive by ignoring its principal concern * * * and its limiting language.").

In this case, the lower courts departed from the statute's clear language *and* from a substantial and consistent body of judicial decisions that correctly construed that language, leading to a judgment that radically and dangerously expands the reach of the Robinson-Patman Act. That judgment cannot stand if this Court holds, as the statutory text requires, that the Robinson-Patman Act makes it unlawful only to "discriminate in price between different *purchasers* * * * where *the effect of such discrimination* may be substantially * * * to injure, destroy, or prevent *competition* with *any person who* * * * *knowingly receives the benefit of such discrimination*." Whether the Court focuses on the straightforward terms "person who * * * knowingly receives the benefit" (Point I) and "purchasers" (Point II), or reaches the more controversial question of what it means "to

injure, destroy, or prevent competition" (Point IV), the statutory language requires reversal, and considerations of antitrust policy and coherence make that result all the more warranted.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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